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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL BENDER, *et al.*,

Petitioners,

v.

THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF OF KIWANIS INTERNATIONAL AND KEY CLUB INTERNATIONAL AS *AMICI CURIAE* PARTIALLY IN SUPPORT OF RESPONDENTS AND PARTIALLY IN SUPPORT OF NEITHER PARTY

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INTEREST OF KIWANIS INTERNATIONAL AND KEY CLUB INTERNATIONAL[1]

As framed and decided in the courts below, this case presents two distinct questions: (1) Whether the petitioner high school students have a right under the Free Speech Clause of the first amendment to engage in their religious activity on the ground that the high school's student activity period constitutes

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[1] Kiwanis International and Key Club International have received the written permission of the parties to file this brief as *amici curiae*, and these consents have been sent to the office of the Clerk for filing.

a "public forum;" and, (2) if the claimed free speech right is found, whether the Establishment Clause requires that petitioners nonetheless be denied access to the high school's activity period. *Amici* Kiwanis International and Key Club International have no interest in the Establishment Clause issue, but they have two interests in the predicate "public forum" issue. First, the Court of Appeals' opinion asserts that high school Key Clubs are "not curriculum-related."[2] Since the recently-enacted Equal Access Act includes a similarly worded standard, if this Court were to repeat that assertion *amici* could find their groups excluded from many high schools. Second, the Court of Appeals' analysis of the constitutional free speech issue in this case could force school officials to exclude Key Clubs from high schools in order to avoid creating a wide-open public forum.

Kiwanis is an organization devoted to the principle of community service and the development of intelligent and active citizenship. Kiwanis International represents local Kiwanis Clubs in more than 8,000 communities throughout the United States and many other countries. Key Club International, an association under the ultimate control of Kiwanis International, represents local Key Clubs, which are organizations of and for high school students.

Key Clubs are sponsored by local Kiwanis Clubs and may be organized at a high school only with the approval and expressed desire of the school officials to have a club at the school. Through the guided initiative and active participation of high school students, Key Club works to promote community service and to develop leadership and active citizenship. Local

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[2] Although it did not advert either to the courses offered at the Williamsport High School or to the specific activities of that Key Club, the Court of Appeals stated that "Key Club, a service and community organization, has little direct relevance to normal course offerings." *Bender v. Williamsport Area School District*, 741 F.2d 538, 549 n.18 (3d Cir. 1984).

Key Clubs develop and conduct educational programs in leadership, civics and citizenship, and also engage directly in community service activities. Particular service activities may be in support of the operation of the high school[3] or of the broader community.[4] Key Club is the largest student organization of its kind and has a highly developed district, national and international structure, over 3,600 active local clubs and more than 107,000 student members.

The interests of *amici* Kiwanis International and Key Club International are directly affected by the resolution of the predicate free speech issue in this case. The Court of Appeals relied in particular upon the presence of the Key Club at the Williamsport High School, together with certain others such as the Chess Club, in determining that the respondent school officials had created a "public forum" activity period, thereby mandating a first amendment right of access for student activities other than those approved by respondents. *See Bender v. Williamsport Area School District*, 741 F.2d 538, 543-44 & n.8, 548-49 & n.18 (3d Cir. 1984).

So far as the "public forum" issue is concerned, the religious nature of petitioners' speech is entirely fortuitous. The

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[3] Typical school-related services include school assemblies dealing with drug and alcohol abuse, suicide, stress, divorce and child abuse, Career Day and vocational guidance, Campus Clean-up, anti-vandalism and anti-cheating campaigns, and providing college scholarships to outstanding graduating seniors. Key Clubs are encouraged to tailor programs to address the individual needs of their schools, and school-related services can take a nearly infinite variety of forms. In one Indiana community, for example, the Key Club raised the funds for and is responsible for servicing and maintaining the large sign in front of the high school informing the public of current school activities.

[4] Typical community-related activities include voter registration and transportation programs, alternative latch-key programs for children of working parents, nursing home visitation and other services to enhance the lives of the elderly and handicapped, and working with established charitable organizations.

principles governing the free speech claim would be identical whether the claim is asserted by these petitioners or by students wishing to engage in speech and related activity of other sorts, including partisan political, extremist, and counter-cultural activities. Under the Court of Appeals decision, so long as a court can discern a connection between the student activity for which access is sought and some "promot[ion of] the intellectual, physical or social development of the students," 741 F.2d at 549 — which under ordinary first amendment doctrine would necessarily include speech and related activity of any sort that is not affirmatively illegal — local school authorities must permit it if they permit a Key Club or other activity the court believes is not "directly related to a particular curricular offering . . . ." *Id.* Thus, local school officials not wishing to lose control over their student activity periods may decide to exclude Key Club and comparable activities.

The interests of these *amici* are potentially affected in another respect as well. Under the Equal Access Act, 20 U.S.C.A. §§ 4071-4074 (Cum. Supp. 1985), which was enacted after the record in this case was framed and the issues decided, a school's activity period is deemed a "limited open forum" if a "noncurriculum related student group" is permitted to meet during "noninstructional time." *Id.*, § 4071(b). The legislative history of the Act indicates, however, that school authorities have discretion to determine in view of local conditions whether particular student activities are "noncurriculum related." Needless repetition by this Court of the Court of Appeals' speculation's on "curriculum-relatedness" as a legal standard or its generic conclusion that Key Club is "not curriculum-related" would adversely affect the interests of *amici* under the Equal Access Act, hindering if not foreclosing the willingness of school administrators to exercise their discretion and determine this issue according to the particular school's curriculum, the activities of the particular Key Club, and other local factors.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding a free speech right of access to a high school's student activity period. As this Court's precedents establish, the government may permissibly distinguish among subject matter categories of speech in a nonpublic forum, and a public forum is created only if made generally available for public use. Neither the particular student activities approved at this high school nor a transgression of the Court of Appeals' "curriculum-related" standard demonstrates the open and indiscriminate use required to create a public forum. Local school authorities may allow selective access to types of activities based upon their relationship to the general operation of the school without converting an activity period into a public forum for students.

The most serious error in the Court of Appeals' "public forum" analysis is its insensitivity to the character and needs of secondary school education. As this Court has recognized, the nature of the educational process requires that local school officials constantly make judgments about the relative educational worth of subjects and materials, and their consistency with community values. This is as true for the student activity period as for the rest of the school day. Even when students are given the initiative in choosing activities, school officials retain authority to decide whether particular activities are of sufficient educational value or are otherwise beneficial to the students and the school.

The question is not, as the Court of Appeals apparently thought, whether a court "considers" an unapproved activity to be beneficial to the students' development or comparable to another activity which has been approved. The question is whether local education officials believe that is so. The activities approved in this case do not show that the local officials had forefeited their responsibility to make these decisions on a case-by-case basis, and the Court of Appeals' "curriculum-related" criterion for a "public forum" undermines the discretion of local officials for no valid first amendment

reason. Under that criterion, school officials must either exclude student activities they believe to be educationally beneficial, or lose to a student-controlled "public forum" their authority to make such judgments altogether.

Local officials must also have authority to exclude contentious and emotion-provoking student activities that would undermine the educational mission of the school. Although perhaps constrained by a prohibition on viewpoint discrimination, local educators may properly exclude categories of controversial activities that would, in their professional judgment, distract student attention and be disruptive to learning during other parts of the school day. No valid reason appears why this authority should be lost merely because school officials allow particular activities that go beyond a court's view of a "curriculum-related" line.

Given the subsequent enactment of the Equal Access Act, this Court should not repeat the Courts of Appeals' speculations as to the nature and type of student activities that meet a "curriculum-related" standard. The statute is not before the Court, the statutory standard may well be different than the constitutional one used by the Court of Appeals, and this case is not factually framed for adjudication of such issues.

ARGUMENT

I. Local School Authorities Have Broad Discretion To Allow Different Types Of Student Activities Without Creating A Public Forum Under The First Amendment.

The Court of Appeals offered three related reasons for holding that the student activity period at the Williamsport Area High School constituted a limited public forum. First, although there was no written or formal policy governing approval of student activities, the high school principal stated in a summary judgment affidavit that an activity would be allowed if it " 'contribute[s] to the intellectual, physical or social development of the students and is otherwise considered legal and constitutionally proper.' " 741 F.2d at 544, 548. The court treated the principal's statement as if it were a statute and used it against the respondents, saying that this standard is "so broad that virtually any program which can be said to benefit the development of the students is permissible . . . ." *Id.* at 549-50. Second, in the memory of the principal, no student club or activity had been denied school sponsorship until the petitioners in this case. *Id.* at 543, 548. Third, the court viewed several of the approved activities as not "directly related to a particular curricular offering", *id.* at 549, and this lack of "curriculum-related[ness]" confirmed the breadth of the "forum" the school had created:

> For instance, Key Club, a service and community organization, has little direct relevance to normal course offerings. Likewise, the Chess Club, the Aviation Club, and the Office Aides, among others, have at best only a tangential relation to a high school course of study.
>
> While it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the Key Club), logical thought (the Chess Club), practical applications of scientific principles (Aviation Club) or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoting of civic, social, and

> intellectual values. Thus, the roster of activities approved in the past reveals no more restrictive limitation on the activity period than that which has been articulated, *i.e.*, that clubs promote the "intellectual, physical, or social development of the students."

741 F.2d at 549 n.18.

The Court of Appeals apparently could see no middle ground between allowing only clubs "directly related to a particular curricular offering" and allowing any activity which, in the *court's* view, "can be said to benefit the development of the students." In essence, because the high school had allowed activities such as Key Club and Chess Club, it had created a limited public forum which must be made available to any student-desired speech and related activity that might be viewed as "promot[ing] the 'intellectual, physical or social development of the students.' "

That reasoning and result obviously cannot be limited to the religious speech and activity involved in this case, and the draconian consequences that necessarily follow for the authority of local school officials should not be overlooked. By ignoring the middle ground, the Court of Appeals' reasoning forces local authorities *either* to limit student activities to those a court thinks are directly related to existing courses, *or* to permit any and all manner of speech and related activity that students desire to engage in, save only that it be legal. Quite apart from any Establishment Clause issues in this case, the Court of Appeals' analysis would require a school with a Key Club or Chess Club to allow also a student-initiated Nazi party, Communist cell, Ku Klux Klan sect, or drug use, sexual liberation or any other countercultural advocacy group that confined its in-school activities to legal speech and conduct. Under ordinary first amendment principles, a federal court could not say that any such speech and activity would not "benefit the development" of students while other forms of speech or advocacy would.

The public forum doctrine does not require local school officials to make this stark choice between either confining student activity to "curriculum-related" activities or permitting virtually any student speech activity. Moreover, while *federal courts* may not be able to distinguish between categories of lawful speech, *local education officials* may indeed distinguish between types of student activities by making — as their everyday duties require — reasonable educational judgments as to what will "benefit the development" of high school students. That lawful discretion of local officials does not evaporate merely because they determine that activities such as Key Club or Chess Club will be beneficial.

A. This Court's Public Forum Doctrine Does Not Require The "Curriculum-Related" Standard Imposed By The Court Of Appeals.

As a general rule, "[t]he state, no less than a private owner of property, has power to preserve the property under its control" and to regulate its use. *United States Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129-30 (1981). Under the "public forum" doctrine, however, there are two exceptions. The first consists of places such as public sidewalks and parks "which by long tradition or government fiat have been devoted to [public] assembly and debate . . . ." *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983). This exception is not involved here, however, because unlike traditional public forums, the Court has never "suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited expressive purposes." *Grayned v. City of Rockford,* 408 U.S. 104, 117-18 (1972). The second exception is where the government has in fact created a public forum by making it "*generally* open to the public even if it was not required to [do so] in the first place."

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. at 45 (emphasis added).[5]

In the case of a "public forum," the government ordinarily may not regulate or prohibit speech on the basis of its content. Otherwise, however, the government may reasonably distinguish on the basis of categories of subject matter, and it is forbidden only from acting to "suppress expression merely because public officials oppose the speaker's view." *Perry Education Ass'n*, 460 U.S. at 46, 49. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (absent a public forum, government may discriminate between partisan political and other speech); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (absent a public forum, government may discriminate between commercial and other speech).

Perry Education Ass'n makes plain the government's power to distinguish between subject matter categories of speech in a nonpublic forum, and also that a public forum is not created unless the government makes it "*generally* open" and available for "*indiscriminate* [public] use." 460 U.S. at 45, 47 (emphasis added). *Perry* rejected the argument that a public school system's internal mail system had become a public forum merely because certain "outside organizations such as the YMCA, Cub Scouts, and other civic and church organizations" had used it with school officials' permission. "*This type of selective access does not transform government property into a public forum.*" *Id.* at 47 (emphasis added). Moreover, any right of access created by the selective access "would in any event extend only to other [groups] . . . of *similar character.*" *Id.* at 48 (emphasis added). Even mechanical application of these principles shows that the Court of Appeals' "curriculum-related" line for distinguishing between a "public forum" and a "nonpublic forum" student activity period is meritless, and that no public forum was created on the basis of the evidence that

[5] Of course, the public forum created may be a limited one, *see Perry Education Ass'n*, 460 U.S. at 46 n.7, as the one found by the Court of Appeals here would be limited to the high school's students.

the court recites in this case.[6]

First, the list of student groups and clubs that had been approved for the activity period in this case simply does not show that the activity period was "*generally open*" and available for "*indiscriminate use*" by the students.[7] Just as the selective access (with prior permission) by the YMCA or other "civic groups" to the mail system in *Perry Education Ass'n* was insufficient to show creation of a public forum constitutionally mandating access for the plaintiff labor organization, so too the presence of the "Aviation Club" or the "Office Aides" does not establish the creation of a public forum constitutionally mandating access for, say, partisan political student groups, let alone more extreme sorts of student activities that the "public forum" conclusion would require.

Second, the obviously imprecise relationship between the groups selectively allowed access in *Perry Education Ass'n*

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[6] There is no hint in this case of the problem that divided the Court in *Perry Education Ass'n* — whether the challenged denial of access represented discrimination based upon hostility to the speaker's point of view.

[7] As stated by the Court of Appeals, in this case:

> [S]tudent clubs which are currently active include: Student Government; Key Club (a student service organization performing community work); Class Organizations (officers for each class); Business English Club; Future Homemakers of America (devoted to learning good home practices and providing service to various charity organizations); Vocational Technical Club; Spanish Club; Speech and Drama Club; Ecology Club; The Cherry & White (student literary art magazine); Billtown Banner (student newspaper); La Memoire (student yearbook); Band; Choir; Office Aides (assisting in filing, answering telephones, and running errands).
>
> Other clubs which have been approved in the past and might be renewed if interest warranted are the Archery; Art; Audubon; Aviation; Bowling; Chemistry; Chess; Field, Forest and Stream; Future Nurses; Future Teachers; German; Poetry; Photography; and Ski Clubs. App. at 367. (Affidavit of Principal W. Newton).

741 F.2d at 543-44 n.8.

shows that no fixed or articulated boundary, such as the Court of Appeals' "curriculum-related" standard, is required to avoid "public forum" status. As in *Perry*, local school officials may make reasonable judgments on a case-by-case basis about the relationship between particular groups and the school's *general* mission. They could, for example, reasonably decide that Key Club as a student activity accords with the school's general objectives in ways that some other group does not. This could be based on a relationship between the school's general obligation to instruct in citizenship and Key Club's teaching of civic responsibilities, or a relationship between the school's general need for resources and a particular Key Club's fund raising or provision of student volunteers to support a given school activity. *See* n. 3, *supra*.

On the authority of *Perry Education Ass'n*, the Eighth Circuit has properly rejected a "public forum" claim in a context that necessarily refutes the Third Circuit's "curriculum-related" standard in this case. *Jarman v. Williams*, 753 F.2d 76 (8th Cir. 1985). There, school authorities had permitted relatively widespread access to the school's gym during non-school times. However, the facilities had

> been used only by certain groups that seem[ed to the court] . . . to be school-related *in the broad sense:* karate instruction, gymnastics, piano lessons, Booster Clubs, the Boy Scouts and the Girl Scouts. Requests by a church to use school facilities for a revival, and by someone who wanted to use the school facilities to conduct a flea market were turned down.

753 F.2d at 79 (emphasis added). On the basis of the decision on similar facts in *Perry*, the Eighth Circuit held that the school gym had not been converted into a public forum "obligat[ing] the school board to allow [it] . . . to be used for any other purpose protected by the First Amendment." *Id.*[8]

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[8] The recent enactment of the Equal Access Act has not mooted

(footnote continued on following page)

B. Local School Officials May Distinguish Among Student Activities Based Upon Judgments As To Their Relative Educational Value Or Relationship To The General Objectives Of The School.

Mechanical application of doctrine aside, by far the more serious error in the Court of Appeals' "public forum" analysis is its insensitivity to the character and needs of secondary school education. In this context, the real "public forum" question is whether the school officials have relinquished their authority to evaluate and distinguish among different student activities in terms of relative educational benefit or other relevant criteria. It is, of course, highly improbable that school authorities would actually do this, at least in the case of activity periods during compulsory attendance hours. Why, if all educational control has been abandoned, should school attendance at that time be

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(footnote continued from previous page)

the constitutional issue presented in this case. First, although that legislation uses a "noncurriculum related" standard to attach a right of access, the statutory standard appears to be more deferential to the judgment of local school officials on this issue than the constitutional one applied by the Court of Appeals in this case. *See* Part II, *infra*. Second, the coverage of the Equal Access Act is limited to "noncurriculum related student groups" meeting during "noninstructional time," which is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends," 20 U.S.C.A. §§ 4071(b), 4072(4), whereas the constitutional "public forum" claim is not so limited.

Moreover, although the issue is not presented to the Court in this case, the "noninstructional time" limitation on the Act's coverage may be far more significant than the United States has suggested to the Court. *See* Brief For The United States As *Amicus Curiae* at 3 n.2. In the highly significant Senate debate on the final version of the Act, one of its co-sponsors flatly stated that the statute had been limited so it would not apply to student activities during times of compulsory school attendance, including homeroom periods (which are the facts of the activity period in the instant case). *See* 130 Cong. Rec. S. 8353-54 (daily ed. June 27, 1984) (colloquy between Senators Packwood and Metzenbaum).

compulsory at all? In any event, the first amendment does not force local officials to choose between either excluding all activities that are not directly "curriculum-related" or else abandoning altogether their control over the subject matter of student activities.

As this Court "has long recognized,"

> local school boards have broad discretion in the management of school affairs. . . . [The Court has] reaffirmed that, by and large, "public education in our Nation is committed to the control of state and local authorities" . . ., that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems," . . . [and has] "repeatedly emphasized . . . the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."

Board of Education v. Pico, 457 U.S. 853, 863-64 (1982) (plurality opinion) (citations omitted). *Accord, id.* at 891 (Burger, C. J., dissenting), *id.* at 894 (Powell, J., dissenting). Moreover, given the nature of the task of education, which includes socialization of children no less than the imparting of information, and "inculcating fundamental values necessary to the maintenance of a democratic political system," the Court has agreed

> that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral or political."

Pico, 457 U.S. at 864 (plurality opinion) (citations omitted). *Accord, e.g., id.* at 876 (Blackmun, J., concurring in part and in judgment) ("[b]ecause of the essential socializing function of schools, local education officials may attempt 'to promote civic virtues' . . . and to 'awake[n] the child to cultural values' ") (citations omitted); *id.* at 889 (Burger, C. J. dissenting); *id.* at

896 (Powell, J., dissenting); *id.* at 909 (Rehnquist, J., dissenting); *Plyler v. Doe,* 457 U.S. 202, 221-23 (1982).

These two salient characteristics of public education — local community control and the value-laden nature of the process — require school officials constantly to make decisions distinguishing among values, subjects and materials in terms of both perceived educational benefit and relationship to the particular school's general philosophy and specific operations. The need for these judgments is no less in the area of student activities than for any other part of the students' school day. And whether school officials allow for student choice over a wide range of activities or rigidly prescribe a narrow approved list, those officials' authority and responsibility for ultimate approval of all activities still require the same sort of judgments about relative educational worth and the local school's general mission.

> Of necessity, . . . secondary educators must separate the relevant from the irrelevant, the appropriate from the inappropriate. . . . This winnowing process necessarily leaves much information to be discovered by students at another time or in another place, and is fundamentally inconsistent with any constitutionally required eclecticism in public education.

Pico, 457 U.S. at 914 (Rehnquist, J., dissenting).

Moreover, the fact that students are given the initiative and allowed a broad range of choice in activities provides no reason — and certainly no *constitutional* reason — for saying that school officials must then forego altogether their ultimate responsibility to decide which matters are of sufficient educational value to deserve a student's time at school. Even where officials articulate a broad standard of permissibility, such as the high school principal's statement in this case, the breadth does not show they have abandoned their responsibility for making difficult decisions on the boundaries. If the articulated policy is broad or imprecise, that may indicate only that hard questions have not arisen before.

The Court of Appeals' "public forum" analysis, however, effectively prohibits local school officials from making these sensitive and discretionary judgments. The court first quotes the respondent school principal's description of his practice as approving " 'any student activity or club which *is considered* to contribute to the intellectual, physical or social development of the students . . . .' " 741 F.2d at 548 (emphasis deleted in part). It then decides that an open forum has been created because *the court* cannot distinguish between activities that have been approved and others that might "be said" to achieve the same results. *Id.* at 549 & n.18. In terms of the principal's description of his practice quoted by the court, however, the issue is not whether *the court* " consider[s]" an activity to "contribute" to educational development but whether the *responsible local school official* considers it to do so.

At least in the absence of viewpoint discrimination, it is up to school officials to judge which proposed student activities will "contribute to [students'] intellectual, physical or social development," particularly as those criteria are implicitly modified by the officials' understanding of the individual school, school system and community. It is simply immaterial whether a court sees "little direct relevance" between a Key Club and "normal course offerings" or "only tangential relation" between the Office Aides and "a high school course of study," or a greater or lesser degree of such relationship between those activities on the one hand and petitioners' proposed religious activities on the other.

Given the responsibility of local school officials to make choices both among alternative educational values and among competing ways to serve the values chosen, the Court of Appeals' "curriculum-related" public forum standard is particularly untenable. That standard destroys in the area of student activities — and for no discernible reason — the ability of local school authorities to perform their function. Either they dare not allow any activity that may lie beyond a court's perception

of a "curriculum-related" line, no matter how beneficial school officials judge the particular activity to be, or they lose control over student activities altogether and must acquiesce in whatever students may think is the "best" use of their school activity time. The courts below identified no reason why the first amendment would require that Hobson's choice.

These *amici* further suggest that far more should be required to create a public forum in a high school activity period than is presented here. The list of familiar high school student activities that had been approved in this case, *see* n. 7, *supra,* does not permit a fair inference that this school principal had abandoned in the area of student activities his responsibility to make educational choices for the students. The fact that activities such as Key Club, Chess Club and Office Aides had been approved does not show — as would be required for a public forum — that a student Nazi Party, a "repeal-the-drug-laws" group, or even the Young Republicans would have been approved. For all that appears in the lower court opinions, and doubtless the fact of the matter, such issues simply had never previously arisen.[9]

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[9] The principal's standard (as articulated in his affidavit on a summary judgment motion) is broad, but that breadth may simply reflect the fact that few, if any, difficult judgments had been required. Hard choices could refine that standard further. Most important, there is no suggestion in this case that respondents were employing a broad standard to shield discrimination based on their hostility to particular ideas or a particular viewpoint.

Similarly, the fact that no previously suggested activity had been disapproved does not prove that a public forum had been established. Indeed, in any situation where the government has allowed limited access but has not created a public forum, some group will necessarily be the first to be denied access and it obviously cannot claim special rights based on that happenstance. *See, e.g., Perry Education Ass'n,* 460 U.S. 37, where so far as appears from the Court's opinion the plaintiff labor organization was the first group to be denied access to the school's internal mail system.

C. Local School Officials May Also Distinguish Among Categories Of Student Activities Based Upon Judgments As To Their Compatibility With The Educational Process And May Preclude Contentious And Emotion-Provoking Activities On This Ground.

In addition to exercising judgments with respect to the educational value of proposed activities, school officials must also have discretion to exclude categories of secondary school student activities where they believe the controversial nature of the subject matter and consequent emotional distractions and psychological stresses would be at odds with the educational mission of the school. The fact is that "in the public school context, perhaps no one, but certainly not the judiciary, can readily ascertain the mental or emotional state that is necessary, appropriate, or desirable for learning to take place." Diamond, *The First Amendment and The Public Schools: The Case Against Judicial Intervention*, 59 Tex. L. Rev. 477, 486 (1981). However difficult that judgment is to make, it is one that must be left to local educators and this is as true for a student activity period as for the rest of the school day.

Educators in a particular school or community may conclude that high school students are best educated by exposure to and struggle with the most controversial and emotionally-charged topics of the day. In another community or school with a different educational philosophy, educators may make an equally informed and reasonable educational judgment that pursuit of a particular subject matter is likely to provoke emotions and reactions that would, by distracting student attention, undermine the learning environment and the educational purposes of the institution. Such a judgment could, for example, be based on predictions of post-activity period student interactions and their lingering effects during the day, such as quarrels about eternal damnation between students who do and do not attend a religious activity. Alternatively, such a judgment could be based upon evaluation of the likely

emotional states of some students during the minutes and hours following their attendance at an ideological or contentious political activity.

> Normal first amendment standards are . . . inappropriate because the proper functioning of the school is not, except at its gross extremes, an objectively ascertainable phenomenon. The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fistfights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. In the street corner context, the court can say that distraction does not matter and can measure the functioning of the institution by whether people can use the streets. The lack of knowledge about what really enables people to learn and about the complex interrelationships of the variables involved prevent courts from judging that no interference has taken place in the school.

Diamond, *supra,* 59 Tex. L. Rev. at 497-98.

Such pedagogical considerations are not unknown to this Court's jurisprudence. In *Waugh v. Board of Trustees,* 237 U.S. 589 (1915), this Court sustained against constitutional challenge a State's decision to forbid students at its public universities to be members of private fraternities, stating that the decision

> may have been induced by the opinion that membership in the prohibited societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions.

Id. at 597. Years later, a lower federal court upheld a rule forbidding such activities by high school students, again on the basis of legitimate educational judgments regarding "divided . . . attention" and student "distract[ions]." *Hughes v. Caddo Parish School Board,* 57 F. Supp. 508, 512-13 (W.D. La.

1944). This Court summarily affirmed. 323 U.S. 685 (1945). More recently, the Sixth Circuit invoked the same sorts of educational considerations in upholding against constitutional challenge a rule forbidding high school students from wearing buttons and similar items which would identify them "as supporters of a cause or bearing messages unrelated to their education." *Guzick v. Drebus,* 431 F.2d 594, 596 (6th Cir. 1970), *cert. denied,* 401 U.S. 948 (1971).[10]

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[10] With little alteration, the trial court findings quoted by Sixth Circuit in support of that conclusion could be equally applicable to a school's decision to exclude a given category of student activities from an activity period:

> "The rule was created in response to a problem which Shaw has had over a period of many years. At the time high school fraternities were in vogue, the various fraternities at Shaw were a divisive and disruptive influence on the school. They carved out portions of the school cafeteria in which only members of a particular fraternity were permitted to sit. The fraternities were competitive and engaged in activities which disrupted the educational process at Shaw. There were fights between members of the individual fraternities and often strong feelings between the members.
>
> "The same problem was encountered with the informal clubs, which replaced high school fraternities and sororities. The problem again exists as a result of the racial mixture at Shaw. Buttons, pins, and other emblems have been used as identifying 'badges.' They have portrayed and defined the divisions among students in the school. They have fostered an undesirable form of competition, division and dislike. The presence of these emblems, badges and buttons are taken to represent, define and depict the actual division of the students in various groups.
>
> "The buttons also encourage division among the students, for they portray and identify the wearer as a member of a particular group or the advocate of a particular cause. This sets the wearer apart from other students wearing different buttons or without buttons. It magnifies the differences between students, encourages emphasis on these differences, and tends to polarize the students into separate, distinct, and unfriendly groups. In

(footnote continued on following page)

It may be conceded for present purposes that this authority to exclude controversial and emotion-provoking student activities for pedagogical reasons is constrained by a first amendment prohibition against viewpoint discrimination, or possibly even open to judicial scrutiny of claims of official hostility to particular ideas such as divided the Court in *Pico v. Board of Education*, 457 U.S. 853.[11] The essential point is that in the absence of illicit motives, the first amendment leaves local officials to make these judgments in ambiguous educational circumstances, especially given the "tremendous empirical uncertainty over what constitutes the best, or even adequate,

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(footnote continued from previous page)

> addition, there have been instances in which students have attempted to force other students to wear a particular manner of dress or to wear their particular insignia or expressive button. For these reasons Shaw High officials have enforced the anti-button rule and have prohibited the wearing of such indicia."

431 F.2d at 596.

[11] However, *Perry Education Ass'n*, 460 U.S. at 52 n.12, suggests that in the absence of such problems, school officials need not prove actual or past disruption of the educational process to justify a categorical exclusion of certain activities on that ground — a reasonable educational judgment is sufficient. True, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), invalidated a ban on student armbands symbolizing opposition to the Vietnam War where it was contended that the resulting student controversy would be disruptive of the educational process. The case is distinguishable, however, as presenting a rather blatant instance of viewpoint discrimination:

> [S]chool authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol — black armbands worn to exhibit opposition to this Nation's involvement in Vietnam — was singled out for prohibition.

393 U.S. at 510-11.

learning environment." Diamond, *supra*, 59 Tex. L. Rev. at 486 n.51 and authorities cited. In this respect as well, however, the needs of public education cannot be accommodated within the Court of Appeals' expansive "public forum" doctrine.

D. *Widmar v. Vincent* Does Not Assist Resolution Of The Public Forum Issue In The Context Of A High School's Student Activity Period.

Whatever the relevance of *Widmar v. Vincent*, 454 U.S. 263 (1981), to the Establishment Clause issue presented here, that case does not materially aid resolution of the predicate "public forum" question. In *Widmar*, the Court repeatedly stated that the university facilities there had been made "generally available" for student activities and were a "generally open forum," 454 U.S. at 264, 267, 268, 269, 274, 277, and no one disputed that a public forum had in fact been created. Rather, *only* religious speech had been singled out and denied access, and the only question was whether the Establishment Clause provided a constitutionally sufficient justification for the discrimination.

It should be apparent for all of the foregoing reasons that *Widmar* is thus unhelpful in addressing the "public forum" question in this case. *Perry Education Ass'n* establishes that the government's permitting only selective access will not create a public forum, and further that if rights of any sort are conferred by reason of the selective access, they would benefit only activities or groups "of similar character." 460 U.S. at 48. *Widmar* does not even address the range and degree of student access to facilities required to create a public forum in the *university* context. It therefore sheds no light whatever on the circumstances required to reach the constitutional conclusion that a *high school's* student activity period constitutes a "public forum." Nor does it provide any support for the Court of Appeals' "directly related to a particular curricular offering" criterion.

II. Given The Intervening Enactment Of The Equal Access Act And Its "Noncurriculum Related" Standard, This Court Should Not Follow The Court Of Appeals' Speculations On "Curriculum-Relatedness" In This Case Which Is Not Properly Framed For Resolution Of That Issue.

After announcing its "curriculum-related" standard for determining whether a high school student activity period is a public forum, the Court of Appeals proclaimed that Key Club, among others, "has little direct relevance to normal course offerings." 741 F.2d at 549 n.18. So far as appears in the court's opinion, however, this conclusion was not based upon evidence in the record as to the particular school's curriculum or the activities of the particular Key Club. The court also speculated that the activities under consideration could "be said . . . [to] enhance the curricular goals of the school" (as by "promoting civic awareness" in the case of Key Club), but then found that this "same extended chain of reasoning" could be used to justify most any activity as curriculum-related and would not distinguish religious activity from any other. *Id.*

As shown above, this "curriculum-related" criterion is not the standard compelled by the first amendment for deciding whether officials at a public high school have created a public forum. Whether Key Club or any other activity is "curriculum-related" is thus not a matter essential to the resolution of this case. However, a similarly-phrased standard is now part of the Equal Access Act, which is not involved here. Under the Act, a public secondary school is deemed to have a "limited open forum" (and thus may not discriminate "on the basis of the religious, political, philosophical, or other content of speech") if it allows "noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(a)-(b); *see* n. 8, *supra.*

Although the issue will doubtless become the subject of future litigation, the legislative history of the Act indicates that local school authorities have considerably more discretion in

making this "noncurriculum related" determination than is indicated by the Court of Appeals' constitutional speculation and its "extended chain of reasoning" remarks in this case. *See, e.g.,* 130 Cong. Rec. S. 8342 (daily ed. June 27, 1984) (colloquy between Senators Hatfield and Gorton); 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Representative Goodling). Under this broader view of their discretion to decide, within reasonable limits, which student activities are and are not "noncurriculum related," particular school authorities have deemed Key Club to be "curriculum related" under the Act. Such determinations will necessarily be made on a case-by-case basis and in view of local circumstances such as the relationship between Key Club's general objectives and a civics course, or the specific club's activities and a course in leadership training.

These issues are not before the Court in this case. These *amici* simply request that the Court's opinion in this case not prejudice the consideration and resolution of these issues under the Act by local officials in a myriad of fact situations around the country. Such prejudice would doubtless result were this Court needlessly to repeat the Court of Appeals abstract reasoning regarding "curriculum-related[ness]" in general and Key Club in particular. This case does not involve the Equal Access Act, a school official's deliberate exercise of discretion under a "curriculum-related" standard, or even, apparently, an evidentiary record framed in light of such a standard. Nevertheless, a broad pronouncement by the Court in this case on the subject of "curriculum relatedness" would erroneously dominate future school officials' decisions as well as potential lower court litigation under the Act.[12]

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[12] *Cf.* Schauer, *"Private" Speech and the "Private" Forum: Givhan v. Western Line School District,* 1979 Sup. Ct. Rev. 217, 217:

> No amount of academic prattle about holdings, dicta, and ratio decidendi can dispel the fact that, in courts other than the Supreme Court, the law is what the Supreme Court says by its words as much as it is what the Court holds by its decisions.

CONCLUSION

Kiwanis International and Key Club International, as *amici curiae,* respectfully submit that in the event this Court finds it necessary to decide the free speech issue, the Court should hold, contrary to the Court of Appeal's opinion, that no public forum and therefore first amendment free speech right of access is shown by the facts surrounding the student activity period in this case. In no event should this Court affirm the Court of Appeal's generic "curriculum-related" standard for determining whether a high school's student activity period constitues a "public forum" under the first amendment. Finally, these *amici* respectfully request that given the enactment of the Equal Access Act, this Court not repeat the Court of Appeal's speculations on that legal standard in general or as applied to Key Club in particular.

Respectfully submitted,

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